91-1418

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Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM M. ABROMS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

DOES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY, AS INTERPRETED BY THE COURT IN *WINSHIP*, REQUIRE THE GOVERNMENT TO PROVE THE ISSUE OF MATERIALITY UNDER 18 U.S.C. § 1623 TO THE TRIER OF FACT BEYOND A REASONABLE DOUBT?

II.

IS UNCORROBORATED EVIDENCE OF A DEFENDANT'S KNOWLEDGE, PURPORTEDLY ACQUIRED MORE THAN TWO HUNDRED DAYS EARLIER, LEGALLY SUFFICIENT TO SUSTAIN A PERJURY CONVICTION UNDER 18 U.S.C. § 1623?

III.

IS THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT VIOLATED WHEN IRRELEVANT, HIGHLY PREJUDICIAL CONVERSATIONS OF CRIMINAL ACTIVITY ARE ADMITTED AS NON-HEARSAY, STATE-OF-MIND EVIDENCE WHEN THE DEFENDANT HAS NO KNOWLEDGE OF THE CONVERSATIONS?

PARTIES BELOW

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NO._____

IN THE

Supreme Court of the United States

October Term, 1991

WILLIAM M. ABROMS,
Petitioner
vs.
UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Defendant Mr. William M. Abroms petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

On September 27, 1990, the U.S. District Court for the Western District of Texas, Edward C. Prado, J., rendered a judgment of guilty against Petitioner Abroms. The district court did not render a written opinion in the case. On appeal, the Fifth Circuit Court of Appeals affirmed, *United States v. Abroms*, 947 F.2d 1241 (5th Cir. 1991)(Appendix A). On December 18, 1991, the Fifth Circuit corrected

factual errors, revised, reaffirmed, and reinstated its original opinion and denied Mr. Abroms' petition for rehearing.

JURISDICTION

The opinion below was rendered on November 15, 1991, and rehearing was denied on December 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

STATEMENT OF THE CASE

A. *Introduction.*

On March 21, 1990, a grand jury sitting in the Western District of Texas, San Antonio Division, returned a Superseding Indictment alleging that Mr. Abroms knowingly gave false testimony on April 5th and 6th, 1989, when he said:

Count 1. That, though he heard conversations about a 10% interest in some companies going to Glen Mauldin (an aide to Senator Jacob "Chic" Hecht of Nevada), to the best of his knowledge, it was never offered to him, and it was for services after he left Government service. *See* Record, vol. 1, pp. 131-136;

Count 2. That he could not recall the names of Senator Hecht and Mr. Mauldin being said at a meeting with some people from Louisiana State University. *Id.*, vol. 1, pp. 136-139[1];

Count 3. That Mr. Tomblin did not tell Mr. Abroms what efforts he was going to make to try to get the Federal Home Loan Bank Board involved in a program to obtain

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1On this count, Mr. Abroms was found not guilty.

control of several million dollars worth of Mexican pesos. *Id.*, vol. 1, pp. 139-141;

Count 4. That he thought a request for approval of a takeover of Suburban Savings had to stand on its own merit, and that the only political pressure that might be brought to bear was to expedite the application and to get it in the right places. *Id.*, vol. 1, pp. 141-144; and

Count 5. That though it may have been mentioned, because it was not germane to what he was doing, he did not know who, other than Mr. Tomblin, might have attended a meeting with the Prime Minister of Grenada in Washington, D.C. *Id.*, vol. 1, pp. 144-145.[2]

Throughout the trial, the prosecution introduced and played excerpts from seventeen conversations and meetings involving Mr. Abroms. *See* Gov. Exhibits 3-19. The prosecution closed by playing the tape recording of Mr. Abroms' testimony before the grand jury. Mr. Abroms' grand jury appearance occurred more than ten months after the first tape-recorded meeting and about seven and one-half months after the last tape-recorded telephone call. *See* Gov. Exhibits 3 & 19 *and* Joint Exhibits 1-A, 1-B, and 2. After his Motion For Judgment of Acquittal was denied, Mr. Abroms rested and the case went to the jury. *See* Record, vol. 14, pp. 4-5.

The jury returned a verdict of "not guilty" on count two and "guilty" on count five, and, because of a deadlocked jury, the court declared a mistrial on counts one, three, and four. *Id.*, vol. 1, p. 90. On September 27, 1990, the trial court sentenced Mr. Abroms to incarceration for twelve months and ordered him to pay a $5,000 fine. *Id.*, vol. 1, pp. 13-17. Immediately after sentencing, the mistried counts

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2On this count, Mr. Abroms was convicted.

were dismissed without prejudice, *Id.*, vol. 15, p. 24, and Mr. Abroms timely filed his notice of appeal. *Id.*, vol. 1, p. 19.

B. *Evidence Relevant To Count Five.*

On September 9, 1988, the Prime Minister of Grenada, his wife, and his assistant met with Messrs. Gonzalez, Stancil, Tomblin, Lachelli, and Mauldin in Washington D.C. to discuss importation of goods from Grenada and purchase and sale of assets located in Grenada, but Mr. Abroms was *not* present at this meeting. *Id.*, vol. 12, pp. 38, 68, 79-80, and 196 (emphasis added). On September 12, 1988, Mr. Tomblin telephoned and told Mr. Abroms, among other things, that he had met with the Prime Minister of Grenada and, during the middle of another sentence, mentioned that "Glen" was at this meeting. *See* Gov. Ex. 15.[3] [4] On April 5, 1989, two hundred and six days after an incidental reference to "Glen's" attendance at a meeting, and on his second day of questioning before the

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3The call interrupted Mr. Abroms, who was conducting a meeting in his office. He took the call anyway, but the people with whom he was meeting stayed in his office during the call. However, Government Exhibit 15 excluded the portion of the call which showed that Mr. Abroms was in a meeting. This fact would have been clear to the jury if Judge Prado had allowed the entire conversation into evidence as requested by Mr. Abroms. *See* Record, vol. 11, pp. 138-141.

4A redacted portion of the text of this phone call is set forth in Appendix C.

grand jury, Mr. Abroms, without the benefit of having his memory in any way refreshed, was asked the following questions and gave the following answers:

> "Q. Do you know who else [besides Mr. Tomblin] might have attended [the meeting at the Grenadian Embassy in Washington, D.C.]?
> A. No, sir.[5]
> Q. Did you ever have an occasion to discuss it with your partners, with Mr. Tomblin or Mr. Lachelli, as to whether or not there was such a meeting and who was there?
> A. He may have mentioned it, it just wasn't germane as to what I was doing."

See Joint Ex. 2, Count 5; *and* Record, vol. 1, pp. 144-146. Moreover, no other evidence was introduced at trial to corroborate Mr. Abroms' purported knowledge of who attended this meeting.

C. *Evidence Relevant to Counts One Through Four.*

The vast majority of the trial involved the introduction of evidence pertaining to counts 1, 2, 3, and 4, on which Mr. Abroms was not convicted. But, Mr. Abroms' jury heard and likely formed impressions about Mr. Abroms from other evidence, and thus a brief review of this evidence is necessary.

On June 2, 1988, Mr. Abroms, a private businessman

5This text is the substance of the count on which Mr. Abroms was found guilty. The underscored portions were alleged by the Grand Jury to be false.

from New Orleans, Louisiana, met with Messrs. Tomblin, Gonzalez, Mauldin, Ladouceur, and Dejonge in San Antonio, Texas to discuss Mr. Abroms' ability to finance a preferred stock offering for Suburban Savings and Loan Association, and to discuss an upcoming meeting in Washington, D.C. with Federal Home Loan Bank Board Commissioner, Danny Wall. *See* Record, vol. 11, pp. 127, 179-180, *and* Gov. Ex. 3.

The persons who attended the June 2, 1988 meeting in San Antonio traveled to Washington, D.C., joined by Mr. Lachelli, a lobbyist, and met with Senator Jacob "Chic" Hecht. Later that day, the group met with Commissioner Wall and his assistant, Ray Meyer. *Id.*, vol. 12, p. 30. The topics discussed with Commissioner Wall included (i) changing control of Suburban Savings to Messrs. Gonzalez and Ladouceur, (ii) a request of forbearance of growth for Suburban Savings, and (iii) the education of Commissioner Wall on a related bond program. *Id.*, vol. 12, pp. 31-32. Mr. Abroms had no interest in the change of control and forbearance projects and made only a "few comments" to Commissioner Wall concerning the bond program. *Id.*, vol. 12, pp. 32, 116, 135, 140-141, and 164.

After meeting with Commissioner Wall, the group met again with Senator Hecht, who suggested that Mr. Gonzales immediately file his application for change of control which the Senator would help get processed. *Id.*, vol. 12, pp. 34-35 and 166. Senator Hecht did not guarantee immediate approval of the application, but instead indicated that the application and the bond program had to stand on their own merits. *Id.*, vol. 12, p. 166 *and* vol. 13, p. 38.

In July of 1988, Mr. Tomblin called Mr. Abroms and informed him of a plan to convert some 30 billion pesos into dollars to be used as equity capital in savings and loans. *See* Gov. Ex. 7. A few days later, Mr. Abroms reported to Mr.

Tomblin that pesos could not be deposited in a U.S. bank. *See* Gov. Ex. 9. Mr. Gonzalez concurred in this conclusion, and thereafter the project was abandoned. *See* Record, vol. 12, p. 175.

ARGUMENT

I.

DOES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY, AS INTERPRETED BY THE COURT IN *WINSHIP*, REQUIRE THE GOVERNMENT TO PROVE THE ISSUE OF MATERIALITY UNDER 18 U.S.C. § 1623 TO THE TRIER OF FACT BEYOND A REASONABLE DOUBT?

1. *In re Winship Requires The Government To Prove The Element Of Materiality Beyond A Reasonable Doubt.*

This Court has explicitly held that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *See In re Winship*, 397 U.S. 358, 364 (1970); *see also Estelle v. McGuire*, 112 S.Ct. 475, 480-81 (1991); *and Schad v. Arizona*, 111 S.Ct. 2491, 2500-01 (1991); *Cf. Cage v. Louisiana*, 111 S.Ct. 328, 329-30 (1991) (reasonable doubt does not rise to the level of "grave" or "moral" uncertainty or "actual substantial doubt," but rather "evidentiary uncertainty"); *See also McMillan v. Pennsylvania*, 477 U.S. 79, 83-91 (1986); *Cabana v. Bullock*, 474 U.S. 376, 384-85

(1986); *Sandstrom v. Montana*, 442 U.S. 510, 519-24 (1979); *Jackson v. Virginia*, 443 U.S. 307, 313-16 (1979); *Patterson v. New York*, 432 U.S. 197, 204-16 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 696-704 (1975).

The reasonable doubt standard plays a vital role in the American scheme of criminal procedure by reducing the risk of convictions resting on factual error. *See Winship*, 397 U.S. at 363. Moreover, findings by a judge cannot cure deficiencies in the jury's determination of a defendant's guilt or innocence resulting from the court's failure to instruct the jury to find an element of the crime. *Cabana v. Bullock*, 474 U.S. 376, 384-385 (1986). Jury instructions relieving the burden to prove every element of the charged offense invade the truth-finding task assigned *solely* to juries in criminal cases. *Carella v. California*, 109 S.Ct. 2419, 2420 (1989)(emphasis added).

In this case, the trial judge committed plain error by failing to submit an essential element of a criminal offense to the jury. *See Screws v. United States*, 325 U.S. 91, 107 (1945) (plurality opinion); *see also United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572- 573 (1977)(a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict regardless of how overwhelmingly the evidence may point in that direction). As an error of due process, the trial judge's mistake required no objection, *see Francis v. Franklin*, 471 U.S. 307, 313 (1985)(citing *In re Winship*, 397 U.S. 358, 363 (1970))(murder conviction set aside because jury instructions could be read as allowing the jury to return a guilty verdict in the absence of proof establishing every statutory element of the crime beyond a reasonable doubt), and is recognized on appeal as *plain error. See Osborne v. Ohio*, 110 S.Ct. 1691, 1716 (1990)(Brennan, J., dissenting)(emphasis added); *Carella v. California*, 109 S.Ct.

2419, 2421-2424, (1989) (Scalia, J., concurring in judgment); *Rose v. Clark*, 478 U.S. 570, 580 n.8 (1986); *Connecticut v. Johnson*, 460 U.S. 73, 85-86 (1983) (plurality opinion); *Jackson v. Virginia* 443 U.S. 307, 320 n.14 (1979).

The trial judge below found that Mr. Abroms' statements were material, instructed the jury accordingly, and thus did not allow the jury to decide whether the prosecution proved materiality beyond a reasonable doubt. In light of rulings by the Fifth Circuit on this issue[6], counsel for Mr. Abroms acquiesced to the trial court's failure to instruct the jury on this element. However, a verdict based on incorrect legal grounds requires reversal; *see Street v. New York*, 394 U.S. 576, 584-88 (1969); *and Yates v. United States*, 354 U.S. 298, 311-12 (1957); furthermore, in *Rose*, this court implied that harmless-error analysis does not apply when a court removes an element of the charge from the determination of the jury because doing so is equivalent to an impermissible directed verdict. *See* 478 U.S. at 3106-08 and n.8.

2. *The Opinion Below Relied Upon Obsolete Principles.*

The opinion of the Fifth Circuit below, that materiality under 18 U.S.C. § 1623 need not be proved

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6*See, e.g., United States v. Hausman*, 711 F.2d 615, 617 (5th Cir. 1983)(the Fifth Circuit recognized the force of an argument that materiality, as an element of the offense, must be decided by the jury, but declined to so hold due to the fact that prior Fifth Circuit decisions to the contrary controlled the court).

beyond a reasonable doubt, is founded on *United States v. Hausmann*, 711 F.2d 615 (5th Cir. 1983). Even though *Hausmann* held that materiality under 18 U.S.C. § 1001 is a question of law to be decided by the court, the *Hausmann* court recognized that a statement's materiality rests on a factual evidentiary showing. *Id.* at 616.

(a) *Hausmann's Reliance On Sinclair.*

Though sister circuits are cited in the opinion, the *Hausmann* decision ultimately relied upon *Sinclair v. United States*, 279 U.S. 263 (1929), a decision of this Court well over a half century old. In *Sinclair*, this Court affirmed the conviction of a witness for refusing to testify before a Senate committee investigating the Teapot Dome scandal. *See Id.* The Court concluded that a Senator's unanswered query was "pertinent to the question under inquiry," as required for conviction of contempt of Congress under 2 U.S.C. § 192, by analogizing pertinency to the relevancy of evidence--a question of law inappropriate for determination by a jury. *See Id.* at 298-99. A critical examination of *Sinclair*, however, indicates that its rationale is no longer persuasive.

(b) *An Examination Of Sinclair.*

In light of the unquestionable vitality of *Winship*, the precedential value of *Sinclair* is questionable. First, this Court did not consider *Winship* or the vast body of due process jurisprudence in deciding *Sinclair*. Second, this Court was concerned in *Sinclair* with the "pertinency" requirement of the offense of refusal to testify before Congress, punishable pursuant to 2 U.S.C. § 192; thus, *Sinclair's* discussion of the issue of materiality might fairly be characterized as *dicta*:

> The question of pertinency under §1[9]2 was rightly decided by the court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary it is uniformly held that relevancy is a question of law. And the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court.
>
> The reasons for holding relevancy and materiality to be questions of law in cases such as those above referred to apply with equal force to the determination of pertinency arising under § 1[9]2. The matter for determination in this case was whether the facts called for by the question were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be "pertinent to the question under inquiry." It would be incongruous and contrary to well-established principles to leave the determination of [the analogous pertinency] matter to a jury.

Sinclair, 279 U.S. at 298-99 (citations omitted).

(c) *Sinclair Relies on Unpersuasive Authority.*

The *Sinclair* court cited three unpersuasive cases for the rule that materiality is a question for the court. The first case, *Carroll v. United States*, 16 F.2d 951 (2nd Cir. 1927), *cert. denied*, 273 U.S. 763 (1927), relied without analysis on the second case cited by *Sinclair*, *United States v. Singleton*, 54 F. 488 (S.D. Ala. 1892). In *Singleton*, the district court decided, *pre-trial*, that materiality had not been sufficiently alleged and dismissed the indictment, but cited no authority and offered no analysis in concluding that materiality was a question for the court. *See* 54 F. at 489-90 (emphasis added). The *Singleton* court was correct, at this stage of the trial, in making pre-trial rulings on the sufficiency of allegations in an indictment, but arguably a different procedure would have been followed to prove materiality if the case had proceeded to trial.

Unlike *Carroll* and *Singleton*, the third case cited by *Sinclair*, *Cothran v. State*, 39 Miss. 541, 547 (1860), did in fact rule that materiality is a question for the court. However, the *Cothran* decision--132 years old--cited no authority and provided no analysis for its decision. *See Id.* at 547.

Moreover, the cases relied upon by *Sinclair* in precluding the jury from deciding issues such as materiality, are no longer the law of this court. *See Sinclair*, 279 U.S. at 299 (citing *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894) and *Horning v. District of Columbia*, 254 U.S. 135 (1920). The *Brimson* court held that a right to trial by jury is not available in criminal prosecutions for contempt, which is no longer valid. *See, e.g., Bloom v. Illinois*, 391 U.S. 194, 197 (1968)(overruling *Brimson*). Furthermore, this Court has ruled that a jail sentence over six months may be imposed only when a jury trial is available. *See Baldwin v. New York*, 399 U.S. 66 (1970).

Sinclair relied upon *Horning* for the rule that a trial

court's failure to instruct the jury with respect to the intent element in an illegal pawnbroking prosecution was not error, which also appears to be of questionable precedential value. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510, 520-24 (1979) (failure to properly instruct jury on element of intent is a due process violation under *Winship*); *and United States v. Gypsum Co.*, 438 U.S. 422, 446 (1978)(the issue of intent must be determined by only the trier of fact). Accordingly, in light of the *Winship* decision, the authority cited by *Sinclair* is questionable as precedent.

(d) *This Court's Reliance On Sinclair Is Not Helpful In Analyzing The Issues In This Petition.*

This Court has cited *Sinclair* without analysis for the rule that pertinency is an issue of law and must be determined by the court. *See Russell v. United States*, 369 U.S. 749, 755-756 (1962); *and Braden v. United States*, 365 U.S. 431, 436-437 (1961). Both of these cases, however, predate *Winship* and offer no analysis of the due process clause of the fifth amendment or the right to a trial by jury of the sixth amendment.

More recently, this Court cited *Sinclair* without analyzing whether it is still valid under modern precedents. *See Kungys v. United States*, 108 S.Ct. 1537, 1547 (1988). In *Kungys*, this Court ruled upon the proper standard for determining materiality in a denaturalization proceedings under 8 U.S.C. § 1451(a), and stated: "Here again we see no reason not to follow what has been done with the materiality requirement under other statutes dealing with misrepresentations to public officers." *Kungys*, 108 S.Ct. at 1547.

The court in *Kungys*, however, did not analyze

whether materiality is a question of fact to be decided by the jury because no party challenged the precedent granting no right to a jury in civil denaturalization proceedings. *See, e.g., Luria v. United States*, 231 U.S. 9, 27-28 (1913); *see also United States v. Walus*, 616 F.2d 283, 304 n.53 (7th Cir. 1980). Also, since *Kungys* was not a criminal proceeding, no party questioned whether proof "beyond a reasonable doubt" was required. *See Kungys*, 108 S.Ct. at 1548 n.9. Nor did any party raise *Winship* authority. *See, e.g., Petitioner Kungys' Supplemental Brief* at 23-26, 29-31 & n.4, 34-36, 108 S.Ct. 1537 (1988); *Respondent United States' Supplemental Brief* at 21 & n.12, 29-30 & n.18, 108 S.Ct. 1537 (1988). Thus, in *Kungys*, this Court did not consider the questions presented by Mr. Abroms, and therefore *Kungys* does not appear to control the issues Mr. Abroms presents in his petition.

Separately, *Kungys'* reliance upon a Sixth Circuit case ruling materiality as a question of law under 18 U.S.C. § 1001 is not controlling in this perjury case. *See* 108 S.Ct. at 1547 (citing *United States v. Abadi*, 706 F.2d 178, 180 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983)). In *Abadi*, the Sixth Circuit ruled that materiality under 18 U.S.C. § 1001 need not be proved beyond a reasonable doubt. *See* 706 F.2d at 180 n.2. Instead, the Sixth Circuit viewed the materiality requirement as a judicially-imposed limitation that insured reasonable application of the statute; accordingly, the *Abadi* court ruled that the materiality of false statements or representation in a prosecution under section 1001 was an issue of law to be determined by the trial court. *See Id.*

The *Abadi* decision is the only circuit court case to expressly reject the *Winship* argument asserted by Mr. Abroms in his petition. *See Abadi*, 706 F.2d at 180. However, the only authority cited by that court in refusing to apply *Winship* was *United States v. Giacalone*, 587 F.2d 5

(6th Cir. 1978), *cert. denied*, 442 U.S. 940 (1979). *See Abadi*, 706 F.2d at 180 n.2. Unfortunately, the very short *Giacalone* opinion is simply another of the many cases that follow *Sinclair* without analysis, and *Giacalone* does not refer to the *Winship* decision or discuss the requirements of due process.[7]

Without valid precedent to rely upon, *Abadi* must, therefore, turn on its own reasoning, which consists solely of the statement, "the materiality requirement [i]s a judicially-imposed limitation to insure the reasonable application of the statute." *Abadi*, 706 F.2d at 180 n.2. According to *Abadi*, even though an element of an offense explicitly provided for in the statute is governed by *Winship*, an element of an offense that is judicially imposed is outside the ambit of *Winship*.[8]

While characterization of "materiality" as a "judicially imposed" element may be correct when analyzing violations of the second and third clauses of the 18 U.S.C. § 1001, at issue in *Abadi*, such analysis is arguably incorrect with respect to the first clause of section 1001, which reflects a

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7 *Giacalone* also relies upon *United States v. Beitling*, 545 F.2d 1106, 1109 (8th Cir. 1976), *cert. denied*, 430 U.S. 918 (1977), which is another case that rotely follows *Sinclair*.

8 *See Abadi*, 706 F.2d at 180 n.2. *But see Gypsum*, 438 U.S. at 434-46 (an element must go to the jury even though it is implied rather than express; failure to properly instruct the jury regarding implied intent element of criminal antitrust offense was error); *and Morrissette v. United States*, 342 U.S. 246 (1952) (failure to properly instruct the jury with respect to implied element of theft statute was error).

legislative determination expressly requiring that a falsified fact be "*material.*"[9] [10]

Moreover, as recognized by this Court, "[d]ecisions about what facts are material and what are immaterial, or in terms of *Winship*, what 'fact[s] [are] necessary to constitute the crime,' and must therefore be proved individually, ... represent value choices more appropriately made ... by a legislature than a court." *See Schad v. Arizona*, 111 S.Ct at

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9 Section 1001 provides:

> Whoever ... [1] knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a *material* fact, or [2] makes any false, fictitious or fraudulent statements or representations, or [3] makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be [punished].

18 U.S.C.A. § 1001 (West 1976)(emphasis added).

10 The appellant in *Abadi* was convicted for making false statements to the Medicaid program by billing for osteopathic treatments he did not perform. *Abadi*, 706 F.2d at 179. Although the opinion is not explicit on this point, the Sixth Circuit implicitly analyzed the convictions as violations of the second clause of section 1001. *See Id.* at 180 n.2. Thus, the reasoning in *Abadi* does not preclude a ruling that proof beyond a reasonable doubt required by *Winship* applies to a congressionally mandated element of an offense but not to one that is judicially imposed.

2500. In *Schad*, this Court exercised judicial restraint and interpreted an Arizona statute defining first-degree murder to encompass alternative theories of either premeditated murder or felony murder as expressly intended by the Arizona legislature. Similarly, the Petitioner asserts that this Court must give effect to the terms employed by Congress to make materiality an expressed element of 18 U.S.C. § 1623;[11] consequently, the *Abadi* ruling is inapposite to the present case.

(e) *Fifth Circuit Criticism of Sinclair.*

The Fifth Circuit reluctantly followed the doctrine of *Sinclair* and implicitly invited the defendant to seek a *writ of certiorari* on the materiality issue:

> [Mr.] Hausmann ... argue[d] that *Sinclair* and its Fifth Circuit progeny violate the cardinal principle that a trial court in a criminal case may never direct a verdict on any essential element of an offense. As a member of this court recently put it, 'the right to be tried by a jury of one's peers finally exacted from the King would be meaningless if the King's judges could call the turn.' *There is force to Hausmann's argument. Unfortunately it is directed to the wrong forum. Sinclair, and the Fifth Circuit decisions applying it to section 1001, control this panel. Unless and until the Supreme Court overrules Sinclair, we are bound to follow the rule it established.*

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11 *See*, Appendix B.

See Hausmann, 711 F.2d at 617 (emphasis added)(citations omitted). The *Hausmann* court's criticism is clear: materiality, as an element of an offense, should be submitted to the fact-finder in a criminal case and proved beyond a reasonable doubt. *See Winship*, 397 U.S. at 364.

In *United States v. Johnson*, 718 F.2d 1317, 1324 (5th Cir. 1983), the Fifth Circuit again criticized *Sinclair* and ultimately limited its application:

> Despite the Supreme Court's statement [in *Sinclair*] that '[t]he reasons for holding relevancy and materiality to be questions of law ... apply with equal force to the determination of pertinency...,' *the comparability of a ruling on the admissibility of evidence, which is the sole question when relevancy is examined, and determining an issue upon which guilt or innocence depends is not immediately obvious to us.* We are, therefore, reluctant to expand *Sinclair's* sweep at the expense of the accused's right to interpose the jury between himself and the judge.

Id. (emphasis added). Accordingly, Petitioner respectfully requests that this Court determine whether *Sinclair* has been overruled *sub silentio* by *Winship* and its progeny, which require proof beyond a reasonable doubt on each and every element of an offense.

3. *The Circuit Courts Of Appeal Are Split.*

There is also a distinct split of authority among the circuit courts of appeal. The appellate cases that follow

Sinclair generally only cite it as authority and follow it without critical analysis. Predominantly in reliance upon *Sinclair*, numerous cases have been decided by the circuit courts of appeal against the position sought by Mr. Abroms.[12]

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12 *See, e.g., United States v. Martinez*, 855 F.2d 621, 623 (9th Cir. 1988)(since materiality is a legal question, the government need not prove it beyond a reasonable doubt for a perjury conviction); *see also United States v. Farnham*, 791 F.2d 331, 334 (4th Cir. 1986)(while the government must establish a nexus between the investigation and the false declaration, it need not prove the connection beyond a reasonable doubt); *and United States v. Larranaga*, 787 F.2d 489, 496 (10th Cir. 1986)(since materiality is a question of law, there is no burden to prove that element beyond a reasonable doubt under section 1623); *United States v. Armilio*, 705 F.2d 939, 941 (8th Cir.), *cert. denied*, 464 U.S. 891 (1983)(the standard of proof for making findings of fact is irrelevant to the determination of materiality under section 1623); *United States v. Berardi*, 629 F.2d 723, 727 (2d Cir.), *cert. denied*, 449 U.S. 995 (1980)(although the government bears the burden of demonstrating materiality under section 1623, it need not be established beyond a reasonable doubt); *United States v. Watson*, 623 F.2d 1198, 1201 n.6 (7th Cir.1980)(section 1623(e), which requires proof beyond a reasonable doubt, does not apply to more than the elements of the crime which are to be submitted for jury determination); *United States v. Giacalone*, 587 F.2d 5, 7 (6th Cir. 1978), *cert. denied*, 442 U.S. 940 (1979)(materiality is a legal question, and therefore, the government need not prove materiality beyond a reasonable doubt in a perjury case).

However, other appellate cases that analyze the issue conclude that materiality is an element of the offense of perjury, turning on facts, and thus must be proved to the jury beyond a reasonable doubt. *See, e.g., United States v. Adler*, 623 F.2d 1287, 1292 n.8 (8th Cir. 1980); *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979)(since materiality is an essential element, as with all other elements of the offense charged, it must be determined by the jury); *United States v. Irwin*, 654 F.2d 671 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982). These circuits have reached a conclusion that conflicts with the Fifth Circuit and other circuits that follow *Sinclair*.

In upholding a conviction under section 1001, the *Irwin* court stated: "We ... remain convinced that materiality is a factual question to be submitted to the jury with proper instructions like other essential elements of the offense, unless the court rules, as a matter of law, that no submissible case is made out by the Government on the issue of materiality." 654 F.2d at 677 n.8; *see also Luse v. United States*, 49 F.2d 241 (9th Cir. 1931) (the question of materiality for purposes of proof of perjury is a mixed question of law and fact, because while the conclusion that a statement is material is a legal one, it is dependent on the purely factual determination of what occurred at the proceeding in which the statement was made).

Moreover, in an exceptionally persuasive analysis of the issue of materiality under 18 U.S.C. § 1623, Judge Lynch, in *United States v. Taylor*, 693 F.Supp. 828 (N.D. Calif. 1988), wrote that he was "convinced that the Supreme Court has implicitly overruled *Sinclair* in its *Winship* cases," and ruled that materiality is a question for the jury which must be proved beyond a reasonable doubt. *Id.* at 847. He further concluded that "[t]he interests of [a] defendant in his constitutional rights to due process and a jury trial--rights

clearly guaranteed by *Winship* authority--outweigh any opposing interests in preserving an anachronistic rule that has survived so long only because it has not been scrutinized sooner." *Id.*[13]

4. *Selected State Courts Refuse To Follow Sinclair.*

Several well-reasoned state appellate court opinions have also concluded that a reliance on *Sinclair* in light of modern precedent is suspect. For example, in *Commonwealth v. McDuffee*, 379 Mass. 353, 398 N.E.2d 463 (1979), the court remarked that *Sinclair's* authority has been "eroded seriously." *See McDuffee*, 379 Mass. at 358, 398 N.E.2d at 468. The *McDuffee* court "s[aw] no justification for removing the issue from the jury," reasoning that:

> the complexity of a legal concept should not justify removing an element of a crime from the jury's determination where there are underlying factual determinations to be made. Certainly in a murder case we would not remove the element of malice aforethought from the jury simply because a judge is better suited to apply that complex and elusive concept to the facts of the case.

Id. at 359, 398 N.E. at 469

In addition, the California Supreme Court observed that the continuing validity of *Sinclair* was doubtful in light

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13In fact, many of the ideas and authority cited herein come from this scholarly opinion.

of *Winship* and *Connecticut v. Johnson*, 460 U.S. 73, 85-86 (1983)(plurality opinion), and concluded that *Winship* required that the jury decide whether a purported corporate promissory note was a security. *See People v. Figueroa*, 41 Cal.3d 714, 733 n.22, 715 P.2d 680, 693 n.22, 224 Cal.Rptr. 719, 732 n.22 (1986).

Furthermore, the New York Supreme Court, Appellate Division, concluded that materiality, as an element of the offense of perjury, is a matter for the trier of fact. *See People v. Clemente*, 285 A.D. 258, 262, 136 N.Y.S.2d 202, 206 (N.Y. App. Div. 1954), *aff'd*, 309 N.Y. 890, 131 N.E.2d 294 (1955)(materiality, as a substantive element of the crime of perjury, is a matter for ultimate determination in the decisional process, and is therefore distinguishable from an evidentiary ruling by the court).

5. *Sound Logic And An Application Of The Winship Mandate Call For An Express Overruling Of Sinclair.*

Though *Hausmann* and some other circuit courts have followed *Sinclair*, none has ever analyzed and reconciled the differing *Sinclair* and *Winship* lines of authority. If allowed, Mr. Abroms will seek a reconciliation of the split in the decisions of the circuit courts and of the conflicts in the decisions of this Court in *Sinclair* and the more recent ruling in *Winship*. If this Court's decisions cannot be reconciled, Mr. Abroms will argue that *Winship* has implicitly overruled *Sinclair* and its progeny and requires that the element of materiality under 18 U.S.C. § 1623 must be proved beyond a reasonable doubt.

II.

IS UNCORROBORATED EVIDENCE OF

A DEFENDANT'S KNOWLEDGE, PURPORTEDLY ACQUIRED MORE THAN TWO HUNDRED DAYS EARLIER, LEGALLY SUFFICIENT TO SUSTAIN A PERJURY CONVICTION UNDER 18 U.S.C. § 1623?

The trial court committed reversible error by convicting Mr. Abroms upon legally insufficient evidence. *See Glasser v. United States*, 315 U.S. 60, 80 (1942). In reviewing the sufficiency of the evidence upon which Mr. Abroms was convicted, the evidence is viewed in a light most favorable to the government and with all reasonable inferences and credibility choices made in support of the jury's verdict. *See Glasser*, 315 U.S. at 80 (1942).

The statute under which Mr. Abroms was convicted expressly requires that the declarations he made while testifying before the grand jury be material and knowingly false.[14] During his testimony before the grand jury, Mr. Abroms denied knowledge of who was in attendance at a meeting he did not attend. Two hundred and six days prior to giving testimony, Mr. Tomblin informed Mr. Abroms of this matter by vaguely stating "Glen went to the meeting" in the middle of a conversation concerning another topic.[15] No other evidence was offered to prove that Mr. Abroms literally remembered what Mr. Tomblin had told him as he testified before the grand jury; furthermore, there was no evidence that Mr. Abroms ever told anyone at any time prior or subsequent to his testimony before the grand jury that he

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14 *See* Appendix B.

15 *See* Appendix C.

knew Mr. Mauldin attended the meeting with the Prime Minister of Grenada.

No evidence was offered to show that Mr. Abroms heard or intellectually comprehended the message, much less retained the information sufficient for recollection and later testimony during the second day of questioning before the Grand Jury. A reasonable trier of fact could *not* have found the essential elements of the offense of perjury proved beyond a reasonable doubt.

III.

IS THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT VIOLATED WHEN IRRELEVANT, HIGHLY PREJUDICIAL CONVERSATIONS OF CRIMINAL ACTIVITY ARE ADMITTED AS NON-HEARSAY, STATE-OF-MIND EVIDENCE WHEN THE DEFENDANT HAS NO KNOWLEDGE OF THE CONVERSATIONS?

The trial court committed reversible error by allowing the jury to hear irrelevant conversations and plans of criminal activity unrelated to Mr. Abroms which prejudicially implicated Mr. Abroms in criminal activities. *See Williams v. New York*, 337 U.S. 241, 247 (1940)(evidence in criminal trials must be "strictly relevant to the particular offense charged"). *See also United States v. Allison*, 474 F.2d 286, 289 (5th Cir. 1973)(the admission of irrelevant facts that have a prejudicial tendency is fatal to a conviction, even though there was sufficient relevant evidence to sustain the verdict).

Rule 401 of the Federal Rules of Evidence defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable

than it would be without the evidence. *See* Fed. R. Evid. 401. Separately, Rule 402 states, *inter alia*, that "[e]vidence which is not relevant is not admissible." *See* Fed. R. Evid. 402. And, Rule 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." *See* Fed. R. Evid. 403.

The trial court erroneously admitted into evidence several irrelevant, incriminating, and prejudicial hearsay conversations which occurred between people other than Mr. Abroms. Mr. Abroms was not present during these conversations, lacked knowledge of them, and each discussion related to criminal activity in which Mr. Abroms was not involved. The evidence concerned:

(a) A June 1, 1988 meeting between Messrs. Tomblin, Gonzalez, and Mauldin during which Mr. Mauldin agreed to assist in expediting review of an application for change of control of Suburban Savings if Mr. Gonzalez made a political contribution of $70,000. *See* Record, vol. 11, pp. 180-182, and vol. 12, pp. 3-5;

(b) July 14, 1988 conversations in Sarasota, Florida concerning payment to Mr. Mauldin of 10% of some business ventures in exchange for his assistance to the ventures while in public office. *See* Record, vol. 12, pp. 70-75, 103;

(c) A meeting during which Mr. Tomblin told Mr. Gonzalez that he had friends, senators,

and other politicians in Washington, D.C. who would assist Mr. Gonzalez and his business partners in a thirty-day turnaround from the Federal Home Loan Bank Board in approving the takeover of Suburban Savings. *See* Record, vol. 11, pp. 175-177; and

(d) Discussions about exercising political influence over Mexican government officials. *See* Record, vol. 12, pp. 85-86 *and* vol. 12, p. 197.

Two of the prejudicial conversations set out above were actual crimes in and of themselves--bribery of a governmental official.

The district court admitted testimony concerning the conversation between Mr. Tomblin and Mr. Gonzalez set out in (a) above, even though no evidence was offered to show that Mr. Abroms had any knowledge of the conversation. After the jury was allowed to hear a restatement of this criminal act, the district court instructed the jury that the conversation was admitted not for its truth, but to show "what the person that said it might have been thinking at the time ... [and] to show his state of mind...."[16]

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16 The court, in the opinion below, failed to articulate a reason why the evidence relating to the first bribe was properly admitted. The court below did, however, state that the testimony regarding discussions about influencing Mexican government officials was admitted to verify that the conversations later repeated to Abroms had occurred, and that testimony regarding the Sarasota, Florida meeting was properly admitted to show Abroms' knowledge and state of

The opinion below correctly states that a statement offered for a purpose other than establishing truthfulness of the assertion is not hearsay. But, according to the instruction of the district court, the first conversation concerning bribery was not admitted to prove that a bribe was in fact made, but rather, the evidence was admitted to prove the "state of mind" of the persons *discussing* the act. *See Abroms*, 947 F.2d 1249-50 (emphasis added). The error in the district court's ruling and the Fifth Circuit's opinion, though, is that the "state of mind" of the persons discussing the first bribe was not relevant to prove Mr. Abroms' state of mind or any material fact necessary to convict Mr. Abroms of perjury; instead, the evidence tended only to incriminate Mr. Abroms by association and thereby prejudiced the jury against him.

The second prejudicial conversation set forth in (b) above concerned a purported bribe to Mr. Mauldin, Senator Hecht's administrative assistant, of 10 percent of certain business ventures in exchange for his assistance while in government office. The opinion below, however, ruled that "[t]he testimony regarding the Sarasota meeting was admitted to show Abroms' knowledge and state of mind regarding Tomblin's statement, "I'm gonna tell Glen again, ... for that ten percent, we wanta see performance." *See Abroms*, 947 F.2d at 1250. However, Mr. Tomblin made the statement in circumstances clearly indicating Mr. Abroms' lack of knowledge of such statement.

> TOMBLIN: What I'm gonna do is get Glen directly on the phone with that guy

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mind regarding Tomblin's statement "I'm gonna tell Glen again, ... for that ten percent, we wanta see performance." *See Abroms*, 947 F.2d at 1249-50.

that was at the end of the table, that, uh, works on the financing?

ABROMS: Liffman. He wasn't at the end of the table.

TOMBLIN: Uh, Liffman, is that the guy?

ABROMS: That's the guy you want to talk to.

TOMBLIN: Alright, and I'm gonna get ....

ABROMS: Mike. Mike Liffman.

[*Abroms begins searching for his notes to find out whether his recollection about the name of Liffman is correct. This is evident from listening to the tape.*]

TOMBLIN: I'm gonna get him and Glen, you know, on the deal direct.

ABROMS: Yes.

[*Abroms still searching for his notes about Mr. Liffman's name.*]

TOMBLIN: And, uh, I'm, I told Glen, I'm gonna tell Glen again, that they're, for that ten percent, we wanta see performance. I wanta see the approval of the grants for the university. That's what I'm looking for them for.

[*Abroms finally finds the name "Liffman" in his notes.*]

ABROMS: Yeah. Mike Liffman.

See Gov. Ex. 22. [Bracketed annotations added]. As indicated by the excerpts from the record, Mr. Abroms was not likely aware of Mr. Tomblin's statements while he was searching through his notes. Moreover, the prosecution

presented no other evidence of Mr. Abroms' purported knowledge of this conversation. In fact, the prosecutor admitted at trial that the evidence "doesn't relate to Mr. Abroms." *See* Record, vol. 12, pp. 16-17. And, Mr. Abroms and Mr. Tomblin later spoke about giving Mr. Mauldin a 10 percent stake in certain business ventures, but these conversations related to Mr. Mauldin's actions after he left government service--consistent with Mr. Abroms' testimony to the grand jury. Thus, the conversation could not have formed the basis of Mr. Abroms' knowledge when he testified before the grand jury, and was therefore, legally irrelevant and inadmissible hearsay.

In determining whether the trial court's errors were harmful in Mr. Abroms' case, the most important factor to consider is the strength of the case against him. *See* 3 WRIGHT, Federal Practice and Procedure § 854, at p. 358. As set forth above, the evidence concerning count 5 likely left the jurors with a reasonable doubt about Mr. Abroms' guilt, but they were arguably tempted to convict him because of his association with people who were conspiring to commit criminal activity. As this Court has ruled, "if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

CONCLUSION

This Court's decision in *Winship* has been the law for better than two decades. In *Winship*, this Court ruled that all elements of an offense must be proved beyond a reasonable doubt. Despite the clarity of this rule, some circuit courts of

appeal have held that materiality, as an element of the offense of perjury, need not be proved beyond a reasonable doubt because it is a "legal question," while other circuit courts have disagreed. The Petitioner respectfully requests that this Court correct the conflict in decisions of the circuit courts and announce that *Winship* overrules *Sinclair* to the extent that *Sinclair* allows a proof of materiality under 18 U.S.C. § 1623 by a standard of less than beyond a reasonable doubt.

Furthermore, based upon the lack of corroborating evidencing proving Mr. Abroms' knowledge of the facts to which he testified before the grand jury, Mr. Abroms' answers to the grand jury were arguably literally true, and his conviction was therefore based on legally insufficient evidence. Finally, when reviewing the record below, this Court will recognize that Mr. Abroms' jury likely convicted him for reasons having nothing to do with his own knowledge as he testified before the grand jury but rather upon the improperly-admitted, irrelevant conversations that wrongly incriminated him in criminal activity.

Respectfully submitted,

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APPENDIX A

U.S. v. ABROMS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

William M. ABROMS,
Defendant-Appellant.

No. 90-5644.

United States Court of Appeals,
Fifth Circuit.
Nov. 15, 1991.

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, DAVIS, and BARKSDALE, Circuit Judges.

BARKSDALE, Circuit Judge:

William M. Abroms challenges his perjury conviction, primarily contending that the evidence was insufficient and that his testimony before the grand jury, on which he was convicted, was not material to its investigation. We AFFIRM.

I.

In the spring of 1988, Danny Gonzalez and Leo Ladouceur, San Antonio, Texas, businessmen, purchased a large share of the stock in Suburban Savings Association (Suburban), a San Antonio savings and loan. Because the purchase gave Gonzalez and Ladouceur control of Suburban, they were required by the Federal Home Loan Bank Board (FHLBB) to obtain its approval of the purchase. Gonzalez discussed this with Darrell Tomblin, a Florida Businessman, who told him that he had political influence through United States Senator Jacob Hecht and Senator Hecht's administrative assistant, Glen Mauldin, which could be used to expedite the approval. He told Gonzalez that in exchange for this influence, Gonzalez would have to make a $70,000 contribution to Senator Hecht's re-election campaign.

At this time, the FBI was investigating Tomblin's and Mauldin's activities. In June 1988, the FBI began surveillance of Ladouceur, a cooperating government witness. On several occasions, a body recorder was used by Ladouceur during meetings. The investigation also involved tapping the telephones of Tomblin (at his restaurant and residence) and one of his business associates.[1]

Tomblin, with Mauldin's assistance, arranged a meeting between Gonzalez and the then chairman of the FHLBB, Danny Wall. Before that meeting, Tomblin had Mauldin fly to San Antonio and told Gonzalez that Mauldin was to receive ten percent of any of the group's business ventures. A meeting took place on June 2, 1988, attended by Mauldin, Ladouceur, Gonzalez, Tomblin, Tomblin's partner Robert DeJonge, and Abroms, a New Orleans

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1Between June 1 and September 1988, several thousand conversations were recorded.

businessman and business associate of Tomblin's for twenty-five years. Ladouceur was wearing a body recorder during this meeting. Among other things, the group discussed using influence through Senator Hecht's office to obtain expedited FHLBB approval, the upcoming meeting in Washington, D.C. with FHLBB Chairman Wall, acquiring ten other savings and loans in which Abroms was to be joint owner, and Abroms' finding investors for Suburban.

On June 8, those in attendance at the June 2 meeting went to Washington, D.C., to meet with Vince Lachelli, a lobbyist hired by the group. That night, Abroms, Ladouceur, Tomblin, and Mauldin met and again discussed using political pressure on the FHLBB through Senator Hecht's office. This meeting was recorded.

The Following day, the group met with Senator Hecht. Next, they met with Chairman Wall and his assistant to discuss the change of control of Suburban and a bond program advocated by Gonzalez. The group went back to meet with Senator Hecht. After this trip, Gonzalez maintained contact with Abroms regarding the acquisition of the ten savings and loans.

Other business plans developing during this time concerned importing products from Grenada and the purchase and sale of an oil refinery in Grenada. In July, Gonzalez traveled to Sarasota, Florida, to meet with Tomblin, Lachelli, and Ladouceur at Tomblin's restaurant. A recorded conference call was held with Abroms, during which the group discussed obtaining a letter from Senator Hecht's office to the FHLBB, encouraging Chairman Wall to approve Gonzalez's bond program and Abroms' sitting on the board of the ten savings and loans.

Tomblin telephoned Abroms later in July and explained a plan to convert about thirty billion pesos into unite States dollars for use as equity capital in buying savings

and loans. he later informed Abroms that Senator Hecht's office was exerting influence to make the plan a success. Abroms located a bank capable of changing the pesos; but, the project was abandoned. These conversations were also recorded.

In other recorded telephone conversations, Tomblin continued to keep Abroms abreast of the efforts to gain FHLBB approval for Gonzalez's takeover. He informed Abroms of the political pressure being applied on Wall and that Tomblin's $250,000 debt to Gonzalez would be canceled if he succeeded. In early August, Tomblin told Abroms that although the FHLBB's Dallas office had not approved the takeover, approval by the Washington office could still be arranged. Tomblin also told Abroms that Ladouceur had been arrested a week earlier by the FBI. Abroms responded, "He scared me too much.... I though he'd put us all in jail." Tomblin replied, "he could if you're not careful, his mouth, you know talking too much."

On September 6, Abroms and Tomblin traveled to Louisiana State University (LSU) in Baton Rouge to obtain several faculty members' assistance in the Grenada business venture. At this meeting, Tomblin mentioned Senator Hecht's and Mauldin's interest in the project and the availability of federal funding. And, on September 8, Tomblin, while in Washington, D.C., made three recorded calls within an hour and a half of each other to Abroms. They discussed the LSU meeting and an upcoming meeting with the Prime Minister of Grenada. Tomblin stated that Abroms would handle the taxes and establish the corporation, Tomblin would handle the "politics", Gonzalez would handle the "up front financing", and Lachelli would help with the "politics" and Grenada. Abroms volunteered to continue to work with LSU. Tomblin and Abroms discussed Mauldin's role in the venture; and Abroms stated, "I'm gonna tell Glen

again, ... for that ten percent, we wanta see performance. I wanta see the approval of the grants for the university."

On September 9, a meeting was held in Washington D.C. with the Prime Minister of Grenada. Gonzalez, Ray Stancil (and oil refinery expert), Tomblin, Lachelli, and Mauldin attended and discussed construction of the refinery. On September 12, in another recorded telephone conversation, Tomblin called Abroms about the September 9 meeting, which Tomblin described as "great". He told Abroms that a trip to Grenada was planned and that "Glen" (Mauldin) attended the meeting. They also discussed Stancil's presence at the meeting, and the possibility of obtaining crude oil from Mexico to feed the Grenada refinery. Later that same afternoon, Abroms and Tomblin discussed obtaining Senator Hecht's influence to forgive some of Mexico's foreign debt in exchange for crude oil for their refinery.

On September 15, 20 and 21, 1988, the FBI interviewed Mauldin, Lachelli, and Tomblin respectively. Tomblin telephoned Abroms to discuss each of these interviews and Ladouceur's arrest. And, again, these conversations were recorded.

Abroms appeared before a grand jury on April 5, 1989, and denied any knowledge of a ten percent interest being offered to Mauldin. He also denied any recollection of Senator Hecht's or Mauldin's names being mentioned at the LSU meeting. When asked about the meeting with the Prime Minister of Grenada, Abroms stated that he was not there and denied any knowledge of who else attended. When asked if Tomblin had discussed the meeting with him, Abroms said, "He may have mentioned it. It just wasn't germane as to what I was doing."

In his testimony before the grand jury the following

day, Abroms denied any knowledge of the July 1988 letter from Senator Hecht's office to the FHLBB. He also denied any knowledge of political influence used to help Gonzalez and Ladouceur gain control of Suburban and claimed to have only recently learned of Ladouceur's arrest and indictment.

On September 13, 1989, Tomblin, Mauldin, and Lachelli were indicted for conspiracy, use of interstate facilities in aid of racketeering, and bribery. That same day, Abroms was indicted for five counts of making false statements before the grand jury, in violation of 18 U.S.C. § 1623.[2] A trial in January 1990 resulted in a hung jury. In March 1990, a superseding indictment was returned, with a new count 5. The new count charged Abroms with knowingly making false and material statements regarding his knowledge of the meeting with the Prime Minister of Grenada. A trial in May 1990 resulted in a conviction on count 5, an acquittal on count 2, and a mistrial on the other counts. The mistried counts were later dismissed without prejudice by the government. Abroms was sentenced to twelve months' imprisonment, followed by three years' supervised release, and fined $5,000.

II

Abroms contends that the evidence was not sufficient to convict him of knowingly making a false statement while testifying before the grand jury; that the answers he gave, that are the basis for count 5, were not material to the grand

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2The indictment charged that Abroms knowingly made false and material statements regarding Mauldin's ten percent interest (count 1), the LSU meeting (count 2), the plan to convert pesos to United States dollars (count 3), Tomblin's efforts to influence the FHLBB (count 4), and Abroms' knowledge of Ladouceur's 1988 indictment (count 5).

jury's investigation; and that the district court erred in admitting testimony regarding conversations to which he was not a party, in not admitting recorded conversations in their entirety, and in denying his motions to reconsolidate his suppression hearing and to suppress the taped conversations.

[1] Section 1623 provides in part that "[w]hoever under oath . . . grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U.S.C. § 1623(a). And, it further provides the [p]roof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence." 18 U.S.C. § 1623(e). The statute "subjects any person knowingly make a 'false material declaration' . . . to a penalty of perjury." *United States v. Salinas*, 923 F.2d 339, 340 (5th Cir.1991) (citing *United States v. Nixon*, 816 F.2d 1022, 1029 (5th Cir.1987), *cert. denied*, 484 U.S. 1026, 108 S.CT. 749, 98 L.Ed.2d 762 (1988)). "[I]n order to obtain a conviction for perjury, the Government must prove that the statements made by the defendant were (1) false, (2) material, and (3) not believed by the defendant to be true." *Id.* (citing *Nixon*, 816 F.2d at 1029).

A.

[2] Abroms' conviction, for which he maintains there was insufficient evidence, was based on the following exchange:

Q. We have been informed that there was, in fact, a meeting like two or three days after the LSU meeting at the Grenadian Embassy in Washington, D.C.

A. Could very well be. I wasn't there.

Q. Okay. You were not there?

A. No.

* * * * * *

Q. Do you know who else might have attended that meeting?
A. *No, Sir*
Q. Did you ever have an occasion to discuss it with your other partners, with Mr. Tomblin or Mr. Lachelli as to whether or not there was such a meeting and who was there?
A. *He may have mentioned it. It just wasn't germane as to what I was doing.*
(Underlined in indictment.) The underlined answers in the indictment were charged to be part of material testimony and to be knowingly false. Abroms contends that these responses were "literally true". In *Bronston v. United States*, 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973), the Supreme Court held that the perjury statute does not apply to a literally true but unresponsive answer. However, "'an answer that is responsive and false on its face does not come within *Bronston's* literal truth analysis simply because the defendant can postulate unstated premises of the question that would make his answer literally true.'" *United States v. Fulbright*, 804 F.2d 847, 851 (5th Cir.1986) (quoting *United States v. Cuesta*, 597 F.2d 903, 920 (5th Cir.), *cert. denied*, 444 U.S. 964, 100 S.Ct. 451, 62 L.Ed.2d 377 (1979)).

[3] Of course, in reviewing the sufficiency of the evidence, we view it in the light most favorable to the government and with all reasonable inferences and credibility choices made in support of the jury's verdict. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). The inquiry is whether any reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982)(en banc), *aff'd*, 462 U.S. 356,103 S.Ct. 2398, 76 L.Ed.2d 638 (1983).

[4] As part of the evidence, the jury heard a recording of Abroms' grand jury testimony and recordings of telephone

conversations and meetings, including Abroms' telephone conversation with Tomblin three days after Tomblin, Mauldin, Stancil, and others met with the Prime Minister of Grenada. As noted, during that conversation, Abroms was told that "Glen" (Mauldin) and Stancil attended the meeting. There is sufficient evidence to support the jury's finding that the answers were false and that he knew that they were false. For example, prior to the meeting with the Prime Minister, Abroms and Tomblin discussed what Mauldin was to do to earn his ten percent in the venture and Abroms' interest in the project. However, before the grand jury, and in response to being asked whether he had ever discussed that meeting with Tomblin or Lachelli, Abroms responded that "He may have mentioned it. It just wasn't germane as to what I was doing." And immediately before that exchange, Abroms denied knowing "who else might have attended that meeting." This was contrary to the recorded conversation, played to the jury, in which Tomblin told Abroms that "Glen" and Stancil attended. Admittedly, the reference to "Glen" in the conversation was very brief. Moreover, the conversation took place almost seven months before Abroms testified before the grand jury. But, these were among the many mitigating factors fully aired for the jury at trial. It goes without saying that these were among the factors for it to weigh and consider.

B.

[5-7] To support a perjury conviction, the government must prove that Abroms' statements were, at the time made, material to the grand jury proceeding in which they were made. *United States v. Holley*, 942 F.2d 916, 923 (5th Cir.1991) (citing *United States v. Gremillion*, 464 F.2d 901, 904-05 (5th Cir.) *cert. denied*, 409 U.S. 1085, 93 S.Ct. 683, 34 L.Ed.2d 672(1972)). "Materiality is a legal question to be decided by the court and is not an issue for the jury to

determine." *Id.* (quoting *Gremillion*, 464 F.2d at 905). But because it is a legal question, "we review the district court's materiality finding *de novo*." *Salinas*, 923 F.2d at 340.

1.

[8] Although Abroms acknowledges that materiality is a legal question, he nevertheless maintains, erroneously, that the government must prove materiality -- a legal question -- beyond a reasonable doubt. He bases this contention on materiality being one of the elements of the offense. In *United States v. Hausmann*, 711 F.2d 615 (5th Cir.1983), this court addressed this same contention, concerning the standard of proof *vel non* for determining materiality under 18 U.S.C. § 1001 (false statement statute).[3] It held that materiality was a legal question and that "[a] standard of proof . . . has no application to the legal question whether a given statement is material." 711 F.2d at 617.[4] Obviously,

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3 18 U.S.C. § 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

4 *Hausmann* provides that "materiality is ultimately a question of law and must be decided by the court." 711 F.2d at 616, even though "[w]hether a statement is material rests on a factual evidentiary showing," *id.*, and is an element of the offense. The court's analysis is most thorough and

the same reasoning applies for § 1623 purposes. In fact, in so holding, the *Hausmann* court relied upon cases from the Sixth and Seventh Circuits reaching the same holding for § 1623 cases, as discussed *infra*, including in note 5. The earlier referenced "proof beyond a reasonable doubt" language in § 1623(e) notwithstanding, seven other circuits have held that for § 1623, materiality need not be established beyond a reasonable doubt.[5] Materiality is a legal question.

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enlightening. It includes a discussion of the seminal decision for this rule, *Sinclair v. United States*, 279 U.S. 263, 49 S.Ct. 268, 73 L.Ed. 692 (1929), concerning testimony before a committee of the United States Senate about the Teapot Dome scandal. As noted, Abroms does not contend that materiality is not a legal question.

5 *See United States v. Martinez*, 855 F.2d 621, 623 (9th Cir.1988) ("Since materiality is a legal question, the government need not prove it beyond a reasonable doubt" for a perjury conviction.); *United States v. Farnham*, 791 R.2d 331, 334 (4th Cir.1986) ("While the government must establish a nexus between the investigation and the false declaration, it need not prove the connection beyond a reasonable doubt."); *United States v. Larranaga*, 787 F.2d 489, 496 (10th Cir. 1986) ("Since materiality is a question of law . . . there was no burden to prove that element beyond a reasonable doubt" in a §1623 case.); *United States v. Armilio*, 705 F.2d 939, 941 (8th Cir.) ("The standards of proof for making findings of fact are, however, simply irrelevant to the determination of materiality" under § 1623.),*cert. denied*, 464 U.S. 891, 104 S.Ct. 235, 78 L.Ed.2d 227 (1983); *United States v. Berardi*, 629 F.2d 723,727 (2nd Cir.) (Although the government bears the

As stated by the Seventh Circuit, relied upon by this court in *Hausmann*, 711 F.2d at 616-18, "[a]s a question of *law*, there cannot appropriately be *any* evidentiary or factual burden with respect to the issue of materiality. A question of law is by definition susceptible on only two answers; 'yes,' the requirements of legal principles are met or 'no,' they are not met." *United States v. Watson*, 623 F.2d 1198, 1202(7th Cir.1980)(emphasis in *Watson*).

2.

As noted, because materiality is a legal question, the district court's ruling on it is reviewed *de novo*. In *Hausmann*, after holding that materiality was a legal question, 711 F.2d at 617, this court stated: "There is another side to this coin. As a question of law, the trial court's materiality finding is fully reviewable on appeal. We disavow any notion that it is shielded by the clearly erroneous rule." *Id.* at 618. The district court concluded that it was material to the grand jury's investigation to determine the nature and extent of Abroms' knowledge of the business activities of Tomblin,

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burden of demonstrating materiality in a § 1623 case, "it need not be established beyond a reasonable doubt."), *cert. denied*, 449 U.S. 995, 101 S.Ct. 534, 66 L.Ed.2d 1198, 1201 n. 6 (7th Cir1980) (There is no indication that § 1623(e) which requires proof beyond a reasonable doubt "applies to more than just the elements of the crime which are to be submitted for jury determination."); *United States v. Giacalone*, 587 F.2d 5,7 (6th Cir.1978) ("Since the issue of materiality is a legal question, not a question of fact, the government need not prove materiality beyond a reasonable doubt" in a perjury case.), *cert denied*, 442 U.S. 940, 99 S.Ct. 2882, 61 L.Ed2d 310(1979). In *Hausmann*, this court relied upon *Watson* and *Giacalone*. 711 F.2d at 618.

Lachelli, and Mauldin, the ownership interest promised to Mauldin in those business activities, the efforts made by Tomblin to obtain political influence with the FHLBB through the use of Mauldin and Senator Hecht's office, the efforts of Tomblin and Mauldin to obtain financing from the United States for their business activities, and the knowledge of Tomblin, Lachelli, Mauldin, and Abroms concerning the scope of the FBI investigation into their activities.

This ruling was based, *inter alia*, on a review of the transcript of Abroms' grand jury testimony and that grand jury's contemporaneous indictment of Tomblin, Mauldin, and Lachelli. Abroms maintains that the transcript of the entire grand jury proceedings, and/or the testimony of the investigating attorney and jury foreperson should have been used to show materiality. "In the usual perjury case, the Government meets its burden of proof either by entering the transcript of the prior proceedings into evidence, or by presenting testimony from persons who witnessed the proceedings." *United States v. Damato*, 554 F.2d 1371, 1373 (5th Cir.1977)(footnotes omitted). As noted, § 1623 does not require that "proof be made by any particular number of witnesses or by documentary or other type of evidence." 18U.S.C. § 1623(e). However, "[w]hile this court has never stated that only certain types of evidence may be used to prove materiality, we have generally looked with disfavor on prosecutions brought under Section 1623 that have not used complete transcripts or testimony of members of the grand jury." *United States v. Cosby*, 601 F.2d 754, 757 (5th Cir.1979).

In *United States v. Thompson*, 637 F.2d 267 (5th Cir.1981), we held that the government satisfied its burden of proving materiality by introducing the indictment brought against the individual who had been investigated by the grand jury, the testimony of a witness to the proceedings, and the

transcript of the defendant's testimony before the grand jury. *Id.* at 269. "While an indictment brought by the same grand jury may not always prove the scope of the investigation, the [Tomblin, Mauldin and Lachelli] indictment did." *Id.* at 269. Moreover, the "probative value of the indictment was buttressed by" the complete transcript of Abroms' testimony before the grand jury. *Id.* at 270.

3.

[9,10] The test for materiality is "whether the false testimony was *capable* of influencing the tribunal on the issue before it." *Salinas*, 923 F.2d at 341 (emphasis in *Salinas*)(quoting *United States v. Giarratano*, 622 F.2d 153, 156 (5th Cir. 1980)). Abroms contends that his testimony was not material, because it was "manifestly incapable of influencing the Grand Jury." As noted, "a concealment or misrepresentation is material if it ' would have the natural effect or tendency to influence' the decision of the tribunal to which it is addressed." *Holley*, 942 F.2d at 923 (quoting *Salinas*, 923 F.2d at 341). "The statements need not be material to any particular issue, but may be material to collateral matters that might influence the court or the jury in the decision of the questions before the tribunal." *Damato*, 554 F.2d at 1373.

[11] The indictment against Tomblin, Mauldin, and Lachelli sets out the scope of the grand jury's investigation. For example, count 1 charges them with conspiracy

> to defraud the United States of its right to the honest, faithful, and impartial services of its employee, Glen N. Mauldin, and to have the functions of the United States Senate and the Federal Home Loan Bank Board administered honestly, fairly, impartially, free from abuse, free from corruption, free from self dealing and free from corruptly induced political influence.

The indictment charges that, as part of this conspiracy, Mauldin, in his position as Senator Hecht's Administrative Assistant, attended a meeting with the Prime Minister to further the business ventures in Grenada. And, it charges Mauldin with directly and indirectly corruptly asking, soliciting, seeking, accepting, and agreeing to receive ten percent interest in business ventures involving the acquisition of investments in Grenada.

In light of this investigation, Abroms' testimony was most capable of influencing the grand jury. Truthful answers may have resulted in further questions regarding the extent of his knowledge and its source. For example, had Abroms testified truthfully that he understood, or was told, that Mauldin attended the meeting, further questions could have been asked, including why Mauldin, a Senator's aide, would have been there, as well as what his personal involvement or stake was.

C.

[12] Abroms contends that part of the government's evidence, including some of Gonzalez's testimony, was hearsay or, in the alternative, irrelevant.[6] He maintains that admission of this testimony constituted reversible error, because it referred to criminal activity "in which Mr. Abroms was in no way connected." As stated, Abroms was

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6Abroms also contends that the district court erred in allowing the prosecutor to argue to the jury that these conversations formed the factual background from which the jury should convict Abroms. However, Abroms did not contemporaneously object. (He did, however, raise the issue in his motion for new trial.) We do not find plain error; his substantial rights were not affected. *See* Fed.R.Crim.P. (52(b).

indicted on five counts. The government's evidence at trial was directed toward obtaining convictions on all five. Therefore, evidence was presented regarding not only Abroms' knowledge about the September 9 meeting with the Prime Minister (count 5), but also about Mauldin's ten percent interest (count 1), the LSU meeting (count 2), the plan to convert pesos to United States dollars (count 3), and Tomblin's efforts to influence the FHLBB (count 4).

[13,14] Needless to say, the admissibility of evidence is a matter within the discretion of the trial court. Fed.R.Evid. 103; *e.g. United States v. Pretel*, 939 F.2d 233, 239 (5th Cir.), *cert. denied*, ____U.S.____, 112 S.Ct. 327, ___ L.Ed.2d ____ (1991). Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). A statement offered for a purpose other than establishing the truthfulness of the assertion is not hearsay. *E.g., United States v. Vizarra-Porras*, 889 F.2d 1435, 1439 (5th Cir.1989), *cert. denied*, ___U.S. ___, 110 S.Ct. 2192, 109 L.Ed.2d 520 (1990). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." Fed.R.Evid. 401.

[15] Abroms challenges the district court's admission of evidence regarding the following: (1) a meeting where Tomblin told Gonzalez that he had friends, senators, and other politicians in Washington, D.C. that could assist Gonzalez to obtain thirty-day turnaround on the FHLBB approval; (2) discussions about obtaining political influence over Mexican government officials; (3) a meeting of Tomblin, Gonzalez, and Mauldin in which Mauldin agreed to help in obtaining timely review of Gonzalez's FHLBB application if Gonzalez would make a $70,000 political

contribution; and (4) a meeting in Sarasota during which the participants discussed Mauldin's receiving ten percent of some of the business ventures in exchange for his assistance in the ventures while in public office. Abroms maintains that because he was not present at these meetings, this evidence was irrelevant. In the alternative, he contends that it was unfairly prejudicial and therefore should have been excluded under Fed.R.Evid. 403. We disagree.

Following the testimony regarding the meeting between Tomblin and Gonzalez, the district court gave the following limiting instruction:

> [W]e're not concerned with whether what was said is true or not but it just gives you an idea of that the person that said it might have been thinking at the time that he said so we're not saying that what was said is absolutely true or not but gives you an idea what he was thinking and for that purpose, to show his state of mind, this evidence is coming in.

The testimony regarding discussions about obtaining political influence over Mexican government officials was admitted to verify that the conversations later repeated to Abroms had occurred. Following the testimony regarding the meeting between Tomblin, Gonzalez, and Mauldin, the district court gave the following limiting instruction:

> When you hear these conversations that go on with regard to this, I think an important factor is was Mr. Abroms there and can you attribute what went on to him? Obviously if he was there, he might know. If he wasn't there, then you might suspect that he didn't know but it might help you in other ways to determine what knowledge he had about the circumstances and all so that's an important

> factor that maybe you should keep in mind as we go through the case and hear the evidence.

The testimony regarding the Sarasota meeting was admitted to show Abroms' knowledge and state of mind regarding his statement "I'm gonna tell Glen again, . . . for that ten percent, we wanta see performance."

The testimony which Abroms challenges was not hearsay. The district court repeatedly gave limiting instructions that the conversations were not admitted to prove the truth of the matters asserted. And, the information elicited was certainly relevant including as to Abroms' state of mind. We find no error.

D.

Abroms sought unsuccessfully to have complete recorded conversations, instead of only the portions selected by the government, played for the jury. Prior to the first tape being played, he contended that [t]o pull out just a thirty minute portion [of the tapes] . . . is unfair because [Abroms] had to sit through and listen to the whole meeting all day long."

[16,17] Fed.R.Evid. 106 provides that "[w]hen a . . . recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part. . . which ought in fairness to be considered contemporaneously with it." In reviewing for an abuse of discretion by the district court concerning Rule 106, we are more than mindful that it also "has discretion to conduct the trial in an efficient and orderly manner in the admission or exclusion of evidence." *United States v. Livingston*, 816 F.2d 184,190 (5th Cir.1987). Abroms wanted the jury to compare the length of the excerpted portions to the length of the entire conversations. However, this goal could have been attained through testimony of the witnesses who prepared the recordings. Indeed, it was elicited about the first tape. The district court did not err in denying Abroms' request to play

the tapes in their entirety to the jury. But, even assuming error, it did not affect Abroms' substantial rights. Fed.R.Evid. 103(a); Fed.R.Crim.P. 52(a).

E.

Finally, Abroms contends that the district court erred by (1) denying his Motion to Reconsolidate and Continue his suppression hearing and (2) denying his Motion to Suppress the tape recordings.[7] In support, however, he only summarily states that "[t]he reasons that the trial court should have granted these Motions are set forth in such Motions and on the record during the suppression hearing."

[18] The "contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on" must be included in the appellant's brief. Fed.R.App.P. 28(a)(4). Because Abroms failed to do so, we do not consider this issue. *E.g. United States v. Lindell*, 881 F.2d 1313, 1325 (5th Cir.1989), *cert. denied*, 493 U.S. 1087, 110 S.Ct. 2621, 110 L.Ed.2d 642(1990); *United States v. Kim*, 884 F.2d 189, 195 (5th Cir.1989). It "would be patently unfair to the [government] for this court to consider this issue as properly before it." *Cannon v. Teamsters &*

7As noted, Tomblin, Mauldin, and Lachelli were indicted on the same day as Abroms. That case was pending before a different district judge, but involved the same tapes as in Abroms'. Therefore, the district judge before whom Abroms' case was pending consolidated it with that of Tomblin, Mauldin, and Lachelli for a suppression hearing before the district judge. However, when Tomblin, Mauldin, and Lachelli obtained a continuance, the district judge in Abroms' case held the suppression hearing for Abroms and ruled the tapes admissible.

Chauffeurs Union, 657 F.2d 173, 178 (7th Cir.1981); *see Thys Co. v Anglo Cal. Nat'l Bank*, 219 F.2d 131, 133 (9th Cir.)("The purpose of the requirements in respect of briefs is to conserve the time and energy of the court and clearly to advise the opposite party of the points he is obliged to meet."), *cert. denied*, 349 U.S. 946, 75 S.Ct. 875, 99 L.Ed. 1272 (1955).

III.

Accordingly, the judgment is
AFFIRMED.

UNITED STATES of America,
Plaintiff-Appellee,
v.
William M. ABROMS,
Defendant-Appellant.
No. 90-5644
United States Court of Appeals,
Fifth Circuit.
Dec. 18, 1991.

Appeal from the United States District Court for the Western District of Texas; Edward C. Prado, Judge.

ON PETITION FOR REHEARING

(Opinion November 15, 1991, 5th Cir.1991, 947 F.2d 1241)

Before BROWN, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:

The opinion of this court reported at 947 F.2d 1241 (5th Cir.1991), as corrected and revised herein, is reaffirmed and reinstated.

We delete the final full sentence on 947 F.2d at 1244 and substitute:

> Tomblin and Abroms discussed Mauldin's role in the venture; and Tomblin stated, "I'm gonna tell Glen again, . . . for that ten percent, we wanta see performance.

We delete the third to the last full sentence on 947 F.2d at 1250 and substitute:

> The testimony regarding the Sarasota meeting was admitted to show Abroms' knowledge and state of mind regarding Tomblin's statement to him that "I'm gonna tell Glen again, . . . for that ten percent, we wanta see performance."

As revised, the original opinion is REINSTATED. Other than the foregoing, the petition for rehearing is DENIED.

APPENDIX B

Constitutional Provisions and Federal Statute Involved

A. The fifth amendment of the Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

U. S. Const., amend. V. (emphasis added).

B. The sixth amendment of the Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const., amend. VI.

C. Petitioner was convicted under the following statute:

False declarations before grand jury or court.

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if--

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the

offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

18 U.S.C.A. § 1623 (West 1984).

APPENDIX C

ABROMS: Hello.

TOMBLIN: Hey, Bill.

ABROMS: Hey, Darrell. How are you doing?

[Portions of phone call in this place are deleted.]

TOMBLIN: Uh, we had a great meeting with the Prime Minister. Got a good letter from uh, LSU.

ABROMS: Yeah, you read that to me.

TOMBLIN: And (sighs) the Prime Minister is expecting us down around the first week of October ...

ABROMS: Uh, huh.

TOMBLIN: ... and said he would sign the contracts, uh, for the refinery if we could show them how Grenada could debt service it, you know what I'm saying.

ABROMS: Yeah.

TOMBLIN: They, he made it clear that they would not sign a contract for a refinery until they knew how to debt service it.

ABROMS: Uh, hmm.

TOMBLIN: Uh. In order to debt service it, we really need to find some subsidized crude oil. Because Ray says that right now, they're (UI) making a few bucks, but its been going up and down and there was no way that you could ever prove to a bank, you could have a profitable operation here without some type of fuel subsidy. So there is a couple of different avenues that -- *Glen went to the meeting with us* -- uh, but one of the things is that Mexico has a standard procedure of selling crude oil to third world countries at $2.00 an hour, uh, barrel, under OPEC's posted price.

ABROMS: Uh, hmm.

[Portions of phone call in this place are deleted.]

ABROMS: Listen, are you gonna be there a little later?
TOMBLIN: Yeah, I'll be here for a while.
ABROMS: Uh, where are you going to be later this evening?
TOMBLIN: Well, uh, I'll probably be over at the restaurant for a while then I'll be at home. Either here or there at the restaurant or home.
ABROMS: I'm in the middle of a meeting, I, I, I ...
TOMBLIN: Oh.
ABROMS: ... got people here and I ... listen uh, Jim Eakins called and he says look, uh, uh, Danny wanted me to give it uh, see about giving those, those take out letter for the lease. He says I want to see a copy of the lease.

[Italicized portion of the text of this call is the ephemeral snipet told to Mr. Abroms 206 days before he testified about who was at the meeting with the Prime Minister of Grenada. The record is devoid of any other evidence showing that Mr. Abroms was ever told "who ... might have attended the meeting [with the Prime Minister]."

(2)

No. 91-1418

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM M. ABROMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly determined that the issue of materiality under 18 U.S.C. 1623 is a question of law for the court and not subject to proof beyond a reasonable doubt.

2. Whether the evidence at trial was sufficient to support petitioner's conviction.

3. Whether evidence of conversations in which petitioner did not take part was properly admitted.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, as amended, Pet. App. 1a-21a, is reported at 947 F.2d 1241.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1991. A petition for rehearing was denied on December 18, 1991. The petition for a writ of certiorari was filed on February 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one count of making false statements to a grand jury, in violation of 18 U.S.C. 1623.[1] He was sentenced to 12 months in prison, to be followed by three years of supervised release, and he was fined $5,000. The court of appeals affirmed. Pet. App. 1a-20a.

1. In 1988, Danny Gonzalez and Leo Ladouceur purchased a large amount of stock in Suburban Savings Association, which is located in San Antonio, Texas. Because that purchase gave them a controlling interest in the bank, it required approval from the Federal Home Loan Bank Board (FHLBB). Gonzalez and Darrell Tomblin, a Florida businessman, discussed the possibility of using Tomblin's influence with Senator Hecht of Nevada to expedite approval. Tomblin told Gonzalez that he would have to make a $70,000 contribution to Senator Hecht's reelection campaign. Tomblin also told Gonzalez that Senator Hecht's administrative assistant, Glen Mauldin, was to receive a ten-percent share in the group's business ventures. Pet. App. 2a.

During this time, the FBI was investigating the activities of Tomblin and Mauldin. Ladouceur cooperated with the investigation and tape recorded a number of meetings. The government recorded telephone conversations of Tomblin and one of his associates. Pet. App. 2a.

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[1] Petitioner was acquitted on another count of making false statements to the grand jury; three other counts were dismissed after the jury failed to reach a verdict.

Petitioner, a businessman from New Orleans, Louisiana, was an associate of Tomblin. On June 2, 1988, petitioner attended a meeting with Mauldin, Ladouceur, Gonzalez, Tomblin, and Tomblin's partner Robert DeJonge. The meeting was surreptitiously recorded by Ladouceur. The group discussed using Senator Hecht's office to obtain expedited approval from the FHLBB, a scheduled meeting between Gonzalez and then-FHLBB Chairman Danny Wall, and plans to acquire ten other savings and loan associations, with petitioner as a joint owner. Pet. App. 2a-3a.

On June 8, 1988, the group met with lobbyist Vince Lachelli and discussed using Senator Hecht to pressure the FHLBB. The next day, the group met with Senator Hecht, then with Chairman Wall, and again with Senator Hecht. After that meeting, petitioner remained in contact with Gonzalez concerning the acquisition of the other savings and loans. In July 1988, Gonzalez, Tomblin, Lachelli, and Ladouceur telephoned petitioner from Sarasota, Florida, to discuss having Senator Hecht send a letter to Chairman Wall concerning some of their business ventures. Pet. App. 3a.

The group also developed plans for other ventures. For example, they planned to import products from Grenada and acquire an oil refinery there, using the assistance of Senator Hecht's office. In a conversation recorded in July 1988, Tomblin told petitioner that he was planning to convert approximately 30 billion Mexican pesos into United States currency to help purchase savings and loans. Tomblin told petitioner that Senator Hecht's office was assisting in that effort. In August 1988, Tomblin told petitioner that Ladouceur had been arrested. Pet. App. 3a-4a.

On September 6, 1988, petitioner and Tomblin met at Louisiana State University (LSU) in Baton Rouge, Louisiana, to seek the assistance of faculty members in pursuing the Grenada venture. Citing Senator Hecht's and Mauldin's interest in the venture, Tomblin mentioned possible federal funding. Pet. App. 4a.

In three recorded telephone calls on September 6, Tomblin and petitioner discussed the LSU meeting and an upcoming meeting with the Prime Minister of Grenada. They discussed how responsibility was to be divided with respect to the Grenada venture, and Tomblin told petitioner that he would be responsible for handling taxes and the incorporation of the business. With regard to Mauldin, petitioner said, "I'm gonna tell Glen again, . . . for that ten percent, we wanta see performance. I wanta see the approval of the grants for the university." Pet. App. 4a-5a.

On September 9, Gonzalez, Tomblin, Lachelli, Mauldin, and an oil refinery expert, Ray Stancil, met with the Prime Minister of Grenada to discuss the refinery project. In a recorded telephone conversation with petitioner on September 12, Tomblin described the September 9 meeting as "great." He told petitioner that a trip to Grenada was planned. Tomblin also stated that "Glen" (*i.e.*, Mauldin) and Stancil had been at the meeting. Tomblin and petitioner discussed getting crude oil from Mexico. Later that day, petitioner and Tomblin talked about using Senator Hecht to obtain debt forgiveness for Mexico in exchange for oil. Pet. App. 5a.

2. On September 15, 20, and 21, 1988, the FBI interviewed Mauldin, Lachelli, and Tomblin. The FBI recorded a telephone conversation in which petitioner and Tomblin discussed those interviews and Ladouceur's arrest. Pet. App. 5a.

On April 5, 1989, petitioner appeared before a federal grand jury. He denied any knowledge of an offer of a ten percent interest to Mauldin. Petitioner said that he did not recall any mention of Senator Hecht's or Mauldin's names at the LSU meeting. He also denied knowing who attended the meeting with the Prime Minister of Grenada. When asked whether Tomblin had discussed the meeting with him, petitioner responded, "He may have mentioned it. It just wasn't germane as to what I was doing." Pet. App. 5a.

On April 6, 1989, petitioner appeared again. He denied any knowledge of a July 1988 letter from Senator Hecht to the FHLBB. He claimed that he was unaware of any use of political influence to help gain control of Suburban. He also claimed that he had only recently learned of the arrest and indictment of Ladouceur. Pet. App. 5a-6a.

3. Petitioner was convicted on one count of making false statements to the grand jury concerning his knowledge of Mauldin's presence at the September 9 meeting with the Prime Minister of Grenada and his discussion with Tomblin about that meeting.[2] On

---

[2] The conviction was based on the following exchange in reference to the September 9, 1988, meeting at the Grenadian Embassy:

> Q: Do you know who else might have attended that meeting?
>
> A: No, Sir.
>
> Q: Did you ever have occasion to discuss it with your other partners, with Mr. Tomblin or Mr. Lachelli as to whether or not there was such a meeting and who was there?
>
> A: He may have mentioned it. It just wasn't germane as to what I was doing.

Pet. App. 8a.

appeal, petitioner disputed the sufficiency of the evidence supporting his conviction. In addition, although he acknowledged that materiality was a question of law under 18 U.S.C. 1623,[3] petitioner argued that the government was required to prove materiality beyond a reasonable doubt. The court of appeals rejected that contention. The court explained that, as a question of law, materiality is not subject to any burden of proof; rather, it is a question for the district court to answer "yes" or "no." Pet. App. 10a-12a.[4]

The court of appeals reviewed the trial court's materiality determination de novo and held that petitioner's false statements were material to the grand jury's investigation of whether Tomblin, Mauldin, and Lachelli conspired to defraud the United States. The court noted that the indictment against those three charged that Mauldin attended a meeting with the Prime Minister of Grenada and that Mauldin unlawfully sought a ten percent interest in business ventures involving Grenada. If petitioner had truthfully answered the questions relating to the September 9, 1988, business meeting at the Grenadian Embassy, the court reasoned, the grand jury could have learned valuable information about Mauldin's involvement in the Grenada refinery project. Pet. App. 12a-15a.

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[3] Section 1623(a) provides in relevant part: "Whoever under oath * * * in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration * * * shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[4] The court of appeals noted that seven other circuits have also held that materiality is a legal question that is not subject to proof beyond a reasonable doubt. Pet. App. 11a-12a & n.5.

The court of appeals rejected petitioner's claim that the district court had erroneously admitted hearsay or irrelevant evidence. Pet. App. 15a-18a. The court of appeals concluded that the evidence in question was not hearsay and that it was relevant to petitioner's state of mind. *Id.* at 18a.[5]

ARGUMENT

1. Petitioner contends that in a prosecution under 18 U.S.C. 1623, the issue of materiality is for the jury, and the government is required to prove materiality beyond a reasonable doubt. Pet. 7-22. Consistent with the decisions of this Court and other courts of appeals, however, the court below correctly determined that materiality is a question of law for the court and, as such, is not subject to proof beyond a reasonable doubt.

The well-settled rule that materiality is for the court to determine originated in *Sinclair* v. *United States*, 279 U.S. 263 (1929). There, the defendant testified before a Senate committee and was charged with "refus[ing] to answer [a] question of pertinence to the question under inquiry," in violation of 2 U.S.C. 102. The Court held that "[t]he question of pertinency under § 102 was rightly decided by the court as one of law." 279 U.S. at 298; accord *Russell* v. *United States*, 369 U.S. 749, 755-756 (1962). Explaining that pertinency "did not depend upon the probative value of evidence," the Court noted that it "may be likened to [questions] concerning relevancy" and that

[5] The court of appeals also rejected petitioner's claims that the district court erred in (1) playing portions of tape recorded conversations, rather than complete conversations; (2) denying his motion to reconsolidate and continue the suppression hearings; and (3) denying his motion to suppress the recordings. Pet. App. 18a-20a. Petitioner does not renew those contentions in this Court.

it "is not essentially different from the question as to materiality of false testimony charged as perjury." 279 U.S. at 298. The Court explained that relevancy and materiality of false testimony are questions of law, *id.* at 298-299, and concluded that it "would be incongruous and contrary to well-established principles to leave the determination of * * * [pertinency] to a jury." *Id.* at 299. Thus, under *Sinclair*, the issue of materiality, like pertinency, should be treated as a question of law for the court, and not a fact question for the jury.

Consistent with *Sinclair*, the courts of appeals have routinely treated materiality under 18 U.S.C. 1623 as a question of law that does not have to be proved beyond a reasonable doubt. See *United States* v. *Martinez*, 855 F.2d 621, 623-624 (9th Cir. 1988); *United States* v. *Farnham*, 791 F.2d 331, 333-334 (4th Cir. 1986); *United States* v. *Larranaga*, 787 F.2d 498, 494, 496 (10th Cir. 1986); *United States* v. *Armilio*, 705 F.2d 939, 941 (8th Cir.), cert. denied, 464 U.S. 891 (1983); *United States* v. *Berardi*, 629 F.2d 723, 727-728 (2d Cir.), cert. denied, 449 U.S. 995 (1980); *United States* v. *Watson*, 623 F.2d 1198, 1201-1202 (7th Cir. 1980); *United States* v. *Giacalone*, 587 F.2d 5, 6-7 (6th Cir. 1978), cert. denied, 442 U.S. 940 (1979); see also *United States* v. *Doherty*, 906 F.2d 41, 43 (1st Cir. 1990). The ruling of the court of appeals in this case is consistent with the uniform position of the circuits.[6]

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[6] Petitioner relies on three court of appeals decisions that he asserts conflict with the decision here. Pet. 20. His reliance on those decisions, however, is misplaced. In *United States* v. *Adler*, 623 F.2d 1287, 1292 & n.8 (8th Cir. 1980), only one judge endorsed the view that materiality should be submitted to the jury; the other two panel members did not join that discussion. And while *United States* v. *Valdez*, 594

Petitioner argues that the reasoning of *Sinclair* has been undercut by this Court's decision in *In re Winship*, 397 U.S. 358 (1970), which held that the Due Process Clause incorporates the reasonable doubt standard. Pet. 13-17. Subsequent to *Winship*, however, this Court in *Kungys* v. *United States*, 485 U.S. 759, 772 (1988), expressly reaffirmed the principle of *Sinclair*. At issue in *Kungys* was a statute, 8 U.S.C. 1451(a), that required the denaturalization of persons who concealed "material facts" from the government in the processing of an application for citizenship. In defining materiality under Section 1451(a), the Court relied on the definition that courts have applied under federal criminal false statement statutes. The Court explained that "neither the evident objective sought to be achieved [by requiring materiality under Section

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F.2d 725, 729 (9th Cir. 1979), held that materiality under 18 U.S.C. 1001 is a question for the jury, the Ninth Circuit later held, in *United States* v. *Martinez*, *supra*, that materiality under Section 1623 is a legal question for the court that is not subject to proof beyond a reasonable doubt. To the extent that *Valdez* and *Martinez* are in tension, that is a matter for the Ninth Circuit, and not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957). Finally, the court in *United States* v. *Irwin*, 654 F.2d 671, 676-677 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982), held that the defendant could not assert error from the submission of the issue of materiality to the jury in a case under 18 U.S.C. 1001, because he had invited the error by submitting a jury instruction. Although the court noted that it had treated materiality as a jury question in the past, *Irwin* preceded the Tenth Circuit's decision in *United States* v. *Larranaga*, 787 F.2d at 494 & n.1, which held that materiality under Section 1623 is a legal question. And in *United States* v. *Daily*, 921 F.2d 994, 1004-1005 (1990), cert. denied, 112 S. Ct. 405 (1991), the Tenth Circuit held that materiality is to be treated as a question of law under Section 1001 as well.

1451(a)], nor the gravity of the consequences that follow from its being met, is so different as to justify adoption of a different standard." 485 U.S. at 770. Of direct relevance here, the Court also concluded that materiality is a question of law; "see[ing] no reason not to follow what has been done with the materiality requirement under other statutes dealing with misrepresentations to public officers," the Court expressly reaffirmed and followed *Sinclair*. *Id.* at 772. Thus, *Kungys* makes clear that, in the context of false statement statutes, materiality is a question of law for the court. See *United States* v. *Daily*, 921 F.2d 994, 1004-1005 (10th Cir. 1990) (recognizing that *Kungys* requires materiality to be treated as a question for the court, notwithstanding prior circuit precedent treating it as a jury question in cases arising under 18 U.S.C. 1001), cert. denied, 112 S. Ct. 405 (1991).

Contrary to petitioner's contention, *Winship* is not inconsistent with *Sinclair*. *Winship* simply held that an accused may not be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 363-364. To say that *Winship* impliedly overrules *Sinclair* is to beg the question whether materiality is a question of fact or of law. *Sinclair*, as reaffirmed by *Kungys*, makes clear that materiality is a legal issue, and thus need not be submitted to the jury or proved beyond a reasonable doubt.[7]

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[7] Petitioner alleges a conflict between this case and the decisions of two state supreme courts. Pet. 21-22. The first case, *People* v. *Figueroa*, 715 P.2d 680 (Cal. 1986), did not concern materiality, but involved the question whether a particular document constituted a "security" within the meaning of a state statute. The court held that the definition of "security" was a legal matter, but the question whether a

2. Petitioner contends that the evidence was insufficient to support his conviction, because the record does not show that he knowingly made false statements. Pet. 22-24. The jury, however, heard tape-recorded evidence indicating that just prior to the September 9, 1988, meeting with the Prime Minister of Grenada, Tomblin and petitioner discussed what Mauldin, Senator Hecht's administrative assistant, could do to earn his ten percent share of the business venture. The evidence further showed that several days after the September 9 meeting, Tomblin told petitioner that Mauldin and Stancil, a refinery expert, had attended the meeting at the Grenadian Embassy. See Pet. App. 5a. The jury could thus reasonably conclude that petitioner gave a knowingly false answer when he told the grand jury he did not know who else attended the September 9 meeting, and that he was testifying falsely when he said that Tomblin "may have mentioned" the meeting but that it was not "germane" to what petitioner was doing.[8]

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particular document satisfied the definition was a factual question for the jury. *Id.* at 693. In distinguishing *Sinclair*, the court questioned that decision's continuing vitality in light of *Winship*. *Id.* at 693 n.22. In *Commonwealth* v. *McDuffee*, 398 N.E.2d 463 (Mass. 1979), the court also concluded that *Sinclair*'s authority had been eroded, and held that materiality in a state perjury case was a question for the jury. *Id.* at 468-470. Both *Figueroa* and *McDuffee*, however, were decided before this Court in *Kungys* reaffirmed the principle that *Sinclair* established.

[8] Petitioner argues that nothing in the record establishes that he remembered what Tomblin told him about the September 9 meeting, which petitioner did not attend and which took place several months before petitioner's grand jury appearance. Pet. 23-24. As the court of appeals noted, however, petitioner presented to the jury all the factors that cast doubt

3. Finally, petitioner contends that conversations in which he did not participate were either hearsay or irrelevant to the case against him, and that the district court erred in admitting those conversations. Pet. 24-29.

The court of appeals properly affirmed the district court's admission of the evidence in question. See Pet. App. 15a-18a. Although petitioner was convicted only on the count involving his statements regarding the September 9 meeting, the indictment also charged that petitioner knowingly made false statements concerning (1) Mauldin's ten percent interest, (2) the meeting at LSU, (3) the plan to convert pesos into dollars, and (4) Tomblin's efforts to secure favorable treatment from the FHLBB. See Pet. App. 6a & n.2. The substance of the challenged conversations (in which petitioner did not participate) involved (1) the meeting in which Tomblin told Gonzalez that he could use political connections to influence the FHLBB, (2) discussions about gaining political influence over Mexican officials, (3) a meeting attended by Mauldin, Tomblin, and Gonzalez, in which Mauldin agreed to help Gonzalez with the FHLBB in exchange for a political contribution to Senator Hecht, and (4) a meeeting in which petitioner's associates discussed Mauldin's ten percent share of their joint enterprise. Pet. App. 16a-17a.

Because petitioner was indicted for making false statements, and not for the underlying offenses to which those false statements pertained, it is clear that the challenged conversations were not admitted for the

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on his knowledge that his statements were false. Pet. App. 9a. Because there was sufficient evidence for a rational jury to infer that petitioner knowingly gave false answers, there is no basis for disturbing the verdict in this case.

truth of the matters asserted and were therefore not hearsay. See Fed. R. Evid. 801(c). In addition, the district court repeatedly gave limiting instructions that the conversations were not being admitted for the truth of the matters asserted. Pet. App. 17a-18a.

The challenged conversations were clearly relevant to the case against petitioner. See Fed. R. Evid. 401. Even though certain conversations took place outside petitioner's presence, the contents of those conversations tended to confirm what was told to petitioner. Pet. App. 17a. Moreover, by showing that petitioner's associates acted with the intent to bribe government officials, the conversations tended to show a motive for petitioner to conceal information about their joint criminal venture from the grand jury. Hence, the conversations were relevant to showing petitioner's state of mind when he gave his answers to the grand jury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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vs.

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On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

The Petitioner hereby supplements his earlier filed Petition For Writ of Certiorari with additional argument based on new authority as it pertains only to his first question presented, to wit:

DOES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY, AS INTERPRETED BY THE COURT IN *WINSHIP*, REQUIRE THE GOVERNMENT TO PROVE THE ISSUE OF MATERIALITY UNDER 18 U.S.C. § 1623 TO THE TRIER OF FACT BEYOND A REASONABLE DOUBT?

ARGUMENT

The trial judge below determined that Petitioner's statements to a grand jury were material under 18 U.S.C. § 1623, instructed the jury accordingly, and thus committed plain error by not allowing the jury to decide whether the prosecution proved materiality beyond a reasonable doubt. Respondent's opposing brief erroneously relies upon the questionable precedential value of *Sinclair v. United States*, 279 U.S. 263 (1929), to assert that materiality, like the issue of pertinency addressed in *Sinclair*, should be treated as a question of law that does not have to be proved beyond a reasonable doubt. This Court has, however, explicitly held that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *See In re Winship*, 397 U.S. 358, 364 (1970).

Respondent argues that this Court expressly reaffirmed the principle of *Sinclair* in *Kungys v. United States*, 485 U.S. 759, 772 (1988), but provides no independent analysis of the issues addressed in *Kungys* to persuade this Court. In fact, Respondent fails to recognize that the statute at issue in *Kungys* does not provide for a trial by jury, see 8 U.S.C. 1451(a), and consequently this Court in *Kungys* did not have occasion to determine whether materiality is a question of fact to be decided by a jury. As the Supreme Court of New Jersey recently noted in analyzing *Kungys*, this Court "saw 'no reason to not follow what has been done with the materiality requirement under other statutes' ... primarily because there was no occasion to address either the constitutional jury-right issue or the related due-process

issue." *See State v. Anderson*, 603 A.2d 928, 933 (N.J. 1992).[1]

Petitioner, like the court in *Anderson*, is not convinced that this Court, when squarely addressing the issue presented herein, would find the rule of *Sinclair* reconcilable with *Winship*. *See Anderson*, 603 A.2d at 933. The *Anderson* court convincingly supports its decision by analyzing the flawed reasoning supporting the decisions of the many courts that have determined materiality in perjury cases to be a question of law for the court. As the *Anderson* court notes, many early cases erroneously equated materiality for purposes of the perjury statute with materiality as a preliminary determination on the admissability of evidence. *See id.* A ruling by a court in favor of materiality of evidence means only that the jury may consider the evidence. *See id.* at 934 (citing *People v. Clemente*, 285 A. D. 258, 136 N.Y.S.2d 202 (1954), *aff'd.*, 309 N.Y. 890, 131 N.E.2d 294 (1955)). However, the materiality of an allegedly false statement depends upon whether the statement could affect, as in Petitioner's case, the outcome or course of a grand jury proceeding; and as such, that determination is clearly within the province and capabilities of the members of a jury. *See Anderson*, 603 A.2d at 934.

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[1]The *Anderson* court recognized that materiality is an element of the offense of perjury, saw no compelling reason to withdraw from the jury the determination of materiality, and held that a provision in a New Jersey perjury statute declaring materiality to be a question of law violates the New Jersey constitution. 603 A.2d at 933-935.

Furthermore, the *Anderson* court justifies its position by recognizing that the rule of *Sinclair* became "well established" as later opinions cited it, apparently with little or no independent analysis. *See Anderson*, 603 A.2d at 934-935. Respondent seemingly invites this Court to do the same. Finally, the *Anderson* court renders its opinion with reference to the many recent cases that have reexamined the validity and soundness of *Sinclair* and emphasized the right of an accused to have the jury find all elements of a crime beyond a reasonable doubt. *Id.* at 934-35.[2]

Several other well-reasoned state court opinions have also concluded that a reliance on *Sinclair* is suspect. *See Commonwealth v. McDuffee*, 379 Mass. 353, 398 N.E.2d 463 (1979)(the *McDuffee* court saw no justification for removing the issue from the jury, reasoning that the complexity of a legal concept should not justify removing an element of a crime from the jury's determination where there are underlying factual determinations to be made); *see also People v. Figueroa*, 41 Cal.3d 714, 715 P.2d 680, 224 Cal.Rptr. 719 (1986); *and People v. Clemente*, 285

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[2]The *Anderson* court concurs with Judge Lynch's federal law analysis of the issue in *United States v. Taylor*, 693 F.Supp. 828 (N.D. 1988). The *Taylor* opinion evidenced Judge Lynch's conviction that materiality in perjury cases is a factual question to be submitted to the jury with proper instructions like other essential elements of the offense, unless the court rules, as a matter of law, that no submissible case is made out by the prosecution on the issue of materiality. 693 F.Supp. at 844 (citing *United States v. Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982)).

A.D. 258, 136 N.Y.S.2d 202 (N.Y. App. Div. 1954), *aff'd*, 309 N.Y. 890, 131 N.E.2d 294 (1955).

Respondent lastly proposes that *Winship* and *Sinclair* may be conveniently reconciled by characterizing materiality as an issue of law, which need not be submitted to the jury or proved beyond a reasonable doubt. Respondent's view fails, however, to give effect to the terms employed by Congress making materiality an expressed element of the offense of perjury under 18 U.S.C. § 1623, overlooks a jury's unquestionable qualifications to decide what could influence a jury's decision, *see Anderson*, 603 A.2d at 935, and ignores Petitioner's right to a jury in a criminal trial to decide all elements of the charged offense beyond a reasonable doubt. *Id.*; *see also Winship*, 397 U.S. at 364.

CONCLUSION

For the reasons stated in the original Petition and as supplemented herein, Mr. Abroms' Petition For Writ Of Certiorari should be granted.

Respectfully submitted.

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